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Supreme Court of the United States

OCTOBER TERM, 1961

No. 373

IN THE MATTER OF THE APPLICATION OF

TWENTIETH CENTURY-FOX FILM CORPORATION,

Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee,

for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

MOTION TO DISMISS APPEAL

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for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

MOTION TO DISMISS APPEAL

Preliminary Statement

The appellant has appealed from a final order of the Court of Appeals of the State of New York, dated March 2, 1961, unanimously affirming two orders of the Appellate Division of the Supreme Court of that State.

The decisions of the Court of Appeals are reported in 9 N. Y. 2d 750, 174 N. E. 2d 535 and 9 N. Y. 2d 792, 175 N. E. 2d 163. The decisions of the Appellate Division are

reported in 8 A. D. 2d 714, 185 S. 2d 838 and 10 A. D. 2d 827, 199 S. 2d 92.

On this appeal the appellant contends that the Import-Export Clause (Art. I, Sec. 10, Cl. 2) of the Federal Constitution bars the City of New York from imposing its general business tax upon appellant, to the extent that it is measured by appellant's gross receipts received from film distributors under contracts by which appellant licensed the distributors to exhibit its films in foreign countries, where the distributors exported the film prints and paid over to appellant a share of the receipts from the exhibition of the films.

Appellant also contends that the Court of Appeals of the State of New York denied it due process of law in violation of the Fourteenth Amendment when, upon the argument of the appeal, it examined certain reports furnished by the appellee and ruled that they should not be included in the record, without disclosing them to the appellant.

Appellee moves to dismiss both phases of the appeal on the ground that they do not present substantial federal questions.

Statutes Involved

The statutes under which the tax is imposed are set forth in Appendix B of the appellant's statement as to jurisdiction.

Statement of the Case

This proceeding was brought under the provisions of Article 78 of the Civil Practice Act of the State of New York to annul a determination of the Comptroller of the City of New York, appellee herein, assessing appellant with New York City general business taxes for the period

from July 1, 1946 to June 30, 1949, in the total principal amount of $37,546.03, plus penalties and interest of $31,880.23, making a total of $69,426.26.

The determination under review was made as the result of a hearing held by the appellee at which evidence was taken. Appellant appeared, and was represented by counsel, at such hearing.

Under the practice in New York the administrative hearing constitutes the trial of the issues in the case. In this case the following proceedings occurred:

Following the administrative hearing held in the office of the appellee he issued a determination assessing tax, penalties and interest against the appellant. Appellant commenced an Article 78 proceeding to review the determination in the Appellate Division of the State Supreme Court, contending that the tax was invalid under the Import-Export Clause, and that the penalties were unlawful and should have been reduced by the appellee to simple interest. The Appellate Division confirmed the determination as to the tax, but annulled it as to the penalties, remanding the matter to the appellee to determine what penalties, if any, should be imposed.

Following a hearing on the remand (limited to the penalties question), the appellee issued a determination affirming the penalties in part. Appellant sought review of this determination in the Appellate Division, which confirmed the determination.

Upon appeal, the Court of Appeals, without opinion, unanimously affirmed the decisions of the Appellate Division, sustaining the tax, penalties and interest as assessed.

At the aforementioned remand hearing on the penalties question appellant specifically asked that the report of the referee in the appellee's office who had conducted the original hearing be made part of the record, which request was refused (fols. 1715-1724). On review, appellant requested

the Appellate Division to require the production of that report and of the report of the referee who conducted the remand hearing (fols. 1627-1628; Pet's Reply Br. on review of remand hearing, p. 7). That Court sustained the ruling of the appellee, stating that such reports contain no evidentiary matter and merely represent opinions of subordinates which the appellee was not bound to follow (Juris. Statement, p. 30).

On the appeal to the Court of Appeals, the appellant asked that Court to direct the appellee to include in the record the reports of the referees who conducted both the original and remand hearings (fols. 2032-2033). On the argument of the appeal in that Court, counsel for the appellee was directed to submit those reports to the Court, which examined them and held that they need not be made a part of the record as they merely represented opinions of subordinates of the appellee and were irrelevant to a decision of the controversy (Juris. Statement, p. 30).

Facts

(1)

Appellant is a New York corporation engaged in business as a motion picture producer, with its principal place of business in the City of New York and a studio in Los Angeles (fols. 567-568, 847-849). The receipts here in issue were received by appellant in the City of New York from two film distributors, Twentieth Century-Fox International Corporation and Twentieth Century-Fox Inter-America, Inc., which were subsidiaries of appellant also having their principal offices in the City of New York (fols. 186-187, 717, 847, 928).

(2)

The contracts between appellant and the distributors were made by the parties in New York City and are en-

titled "Motion Picture Purchase and Sale Agreement" (fols. 844, 847-848, 896, 925, 928-929, 977). They provide that appellant sells to the distributor (fols. 851, 932):

> "its sole and exclusive right under copyright * * * and * * * the sole and exclusive right to exhibit and to resell the right to exhibit within and throughout the said (foreign) Territory"

motion picture productions released or controlled by appellant.

Appellant also agrees to deliver to the distributor the necessary film prints, such delivery to consist of "delivery to International (or to Inter-America) at its principal office in the City of New York, or other port or embarkation point," as designated by appellant; the delivery to be "f.o.b. New York or other port" as designated by appellant (fols. 859-860, 877, 939-940, 958).

The distributor agrees that, upon such delivery of the productions, it (the distributor) shall undertake their distribution throughout the licensed Territory to the extent that it (the distributor) "shall deem to be commercially profitable" (fols. 862-864, 942-944). The distributor agrees to release such productions in the countries of the Territory (fols. 865, 945):

> "within a reasonable time after delivery of each of said productions to International (or Inter-America), taking into consideration the present practices, existing laws and prevailing customs in each of said countries."

The distributor agrees to pay to appellant "for the sale to it of the aforesaid sole and exclusive right to exhibit and to resell the right to exhibit" appellant's productions in the foreign territory, a specified share of all moneys "received by (the distributor) from the exhibition of and

from the resale of the right to exhibit" the productions (fols. 868-871, 948-952).

In addition, the distributor agrees to pay to appellant the cost of the prints and to pay all distribution costs, such as shipping charges, customs, duties, etc. (fols. 872-873, 953-954).

It is further agreed that all moneys due appellant under the contract shall be paid to it "at its office in New York City by weekly remittances on account in United States dollars" (fols. 877, 958-959).

Finally, the parties agree that the contract is intended "as simply a purchase and sale agreement"; that the appellant is not to be liable for, or bound by, any representations, acts or omissions of the distributor, which is not to be deemed an agent or representative of appellant; and that the agreement is not to constitute a partnership or joint adventure between the parties (fols. 884-886, 966-967).

(3)

In performing the contract the distributor entered into contracts with distributing companies located in foreign countries, under which the distributor rented the film to the foreign distributors in exchange for a percentage of the receipts (fols. 370-374, 379-380). The foreign distributors in turn rented the films to theatre companies in the foreign countries for exhibition, crediting the distributor in New York City with its share of the proceeds and periodically transferring cash to such distributor (fols. 376-377, 380-382, 392-393).

The appellant and the distributor in New York City maintained inter-company accounts showing the amount of money owing by one to the other, through which the distributor paid the amounts owed to appellant "with cash settlements regularly, at least once a month" (fols. 354-355, 715-719, 771-772, City's Exh. O, p. 485).

(4)

Both black and white films and color films were distributed under these agreements (fol. 161).

In the case of black and white films, the distributor in New York City would order the prints from De Luxe Laboratories, Inc., a subsidiary of appellant engaged in business as a commercial processor of motion picture films and also located in New York City (fols. 160-164, 190, 216, Txp's Exh. 7, p. 329). The prints were made by De Luxe from a negative furnished by the appellant (fols. 208-209). When made, De Luxe delivered the prints to its shipping department and notified the distributor (fols. 151, 540-543). The distributor then issued shipping instructions to the De Luxe shipping clerk, whereupon De Luxe packed the prints for shipment and submitted the packing list to the distributor's billing department and foreign service department (fols. 543-545).

The distributor then prepared invoices for the prints directed to the foreign customer (which invoices showed the distributor as the seller), and sent the packing list to a shipping broker which booked the shipment on a carrier and advised the De Luxe shipping department to deliver the prints to the carrier (fols. 545-551).

In the case of color film the distributor ordered the prints from a technicolor motion picture corporation in Hollywood, directing it to ship the prints to De Luxe Laboratories, Inc., which acted as the distributor's "shipping depot" (fols. 161-165, 170, 221-222). The shipping of such prints to foreign countries was made in the same manner as black and white prints (fol. 171).

(5)

The record reveals that, in actual practice, many of the prints (both black and white and color prints) were not shipped abroad until some time after De Luxe Labora-

tories, Inc. had notified the distributor that they were ready. A good many such prints were placed in storage by the distributor and were not shipped out until later.

In ordering color film the distributor usually ordered a number of extra prints to be held in reserve (fols. 183, 459-460). When these arrived at De Luxe Laboratories, the distributor directed them to be delivered by De Luxe to a storage warehouse in New Jersey operated by an independent concern named Bonded Film Storage, Inc., which stored them until the distributor needed them, at which time they were returned to De Luxe in New York City for shipment under instructions from the distributor (fols. 471-472, 556-558, 669-671). The distributor paid the storage charges for these prints directly to the storage concern (fol. 672).

During the tax period, 1946-1948, the distributor did not order black and white film prints for reserve, as De Luxe could supply prints on reorder quickly (fols. 613-614). The distributor, however, caused black and white film prints to be held in storage for a number of reasons (fols. 461-463, 472-473, 639-643, 677-678).

One example of this was a situation that developed in connection with the distribution of films in Greece in 1951, which was stated to be typical of what occurred in the tax period, 1946-1948 (fols. 645-648). On June 22, 1951 the distributor obtained from De Luxe two black and white prints of a film entitled "The Frogmen" for shipment to Greece, which were not shipped out until almost four months later, on October 11, 1951 and which, in the interim, were held by the distributor in storage (fols. 510-512; City's Exh. L, p. 477).

After holding them in storage for this period, the distributor, by a letter dated October 11, 1951, directed its warehouse to return the two prints "to our Traffic Department" and to remove them "from our inventory"

(fol. 814; City's Exh. T, p. 512). At the same time it advised De Luxe that it had recalled the prints from storage and instructed De Luxe to ship them to Greece (*id.*, p. 513).

(6)

The following statements of fact contained in the Jurisdictional Statement are misleading in that they suggest that appellant, rather than the distributors, exported the film prints.

(a)

Appellant asserts that the film was "shipped by appellant from New York City to such foreign countries" (Juris. Statement, p. 9), a statement contrary to the terms of the contracts and refuted by the testimony. The contracts require the distributors to make such shipments at their own expense (fols. 862-864, 873, 942-944, 954). And, as we have shown, in practice the shipments were made at the direction of the distributor, in the distributor's name, and in accordance with contracts entered into between the distributor and concerns in the foreign territory (fols. 370-371, 543-544, 549-551).

Appellant cites pages 55-58, 73-74, 267-276 of the record and Exhibits 3, 4 and 5, in support of its assertion.

At pages 55-58, Mr. Klor, an employee of the distributors, stated that the prints were physically shipped by the shipping department of De Luxe Laboratories, Inc., and that such shipments were made under shipping instructions given by him (*i.e., the distributor*) to De Luxe (fol. 167).

At pages 73-74, Mr. Freedman, president of De Luxe Laboratories, Inc., stated that De Luxe packed the prints and delivered them to the carriers for export. He in no way indicated that appellant shipped them.

At pages 267-276, Mr. Klor and Mr. Freedman testified regarding certain technicolor film prints and matrices

which are not even in issue in this proceeding. The items were shipped directly to foreign countries from the technicolor laboratories in California, and no tax has been assessed against appellant with respect to those transactions in the final determination (fols. 59-60, Txp's. Exh. 20).

Exhibits 3, 4 and 5 are the contracts between appellant and the distributors, which, as we have indicated, place the responsibility for shipping the film on the distributors rather than on appellant.

(b)

Appellant asserts that "In no instance were the black and white films delivered to International or to Inter-America in the United States or stored by them in the United States" (Juris. Statement, pp. 11-12), citing pages 56, 73-74, 205 and 219 of the record.

At page 56 Mr. Klor, and at pages 73-74 Mr. Freedman, testified that De Luxe Laboratories, Inc. did not deliver any film prints to officers or employees of the distributors, or to the premises of the distributors. As we have shown, De Luxe Laboratories, Inc. made delivery to the distributors by delivering the finished prints to its (De Luxe's) shipping department, after which, the distributor would issue instructions to De Luxe with respect to those prints (fols. 540-551).

At pages 205 and 219, Mr. Klor simply stated that the distributors did not order extra black and white prints for reserve. He did not say that such prints were not stored in the warehouse. And there is ample evidence that black and white prints were stored there. For example, City's Exhibit G (p. 472) is an inventory sheet of films in the warehouse (fols. 459-470). Two of the films listed, "Night Without Sleep" and "Don't Bother to Knock", were black and white films (fols. 460-461, 466).

City's Exhibit L is headed "Bonded Film Storage Inventory" and relates to the film, "The Frogmen" (p. 477). "The Frogmen" was a black and white film, the prints of which were kept in storge by the distributor for four months (fols. 510-512).

(c)

Appellant repeatedly asserts that the shipping expenses involved in exporting the film prints were charged by De Luxe Laboratories, Inc. (and by the concern that made the technicolor prints) to appellant and were paid by appellant (Juris. Statement, pp. 11-13). This statement creates the impression that, despite the contract provisions expressly requiring the distributors to pay the shipping charges (fols. 873, 954), the appellant paid them. The record shows that, in accordance with the terms of the contract, the distributors paid these expenses; appellant's own Disbursement Auditor testifying to that effect (fol. 776), with the appellant's ledger account before him (fols. 585, 715).

Furthermore, as provided in the contracts (fols. 872, 953), the cost of making the prints was also paid by the distributors; De Luxe Laboratories, Inc. and the technicolor concern charging appellant for printing them, and appellant charging that cost to the distributors (fols. 736-737, 768-769).

ARGUMENT

POINT I

The Import-Export Clause does not bar the tax. The receipts which have been taxed are receipts from a sale or lease of rights under local contracts entered into with local customers (distributors). Insofar as the petitioner's receipts may be found to be based on the delivery of film prints to such customers, the transactions did not involve an export since the prints were delivered locally before the customers started them in the stream of foreign commerce.

(1)

Appellant's assertion that the Import-Export Clause bars the tax must be considered in light of the fact that appellant itself did not distribute or export the films in or to foreign countries but, under contracts made with film distributors located in the City of New York, sold or leased the exclusive exhibition rights to such distributors. Appellant simply delivered the film prints to the distributor in the City of New York and the distributor thereafter handled the distribution of the films.

Thus, the receipts do not stem from an export by appellant but from a contract made by it with a distributor located in the City of New York, under which the appellant granted the distributor certain film exhibition rights. The case is similar, in this respect, to *Matter of Steinbeck* v. *Gerosa*, 4 N. Y. 2d 302, 151 N. E. 2d 170 (1958), app. dism., 358 U. S. 39 (1958), where the same tax was sustained on Mr. Steinbeck's royalties from the sale of his books abroad, the New York court saying that "the *source* of Mr. Steinbeck's income was not the sales made by the publisher, but the contracts made between him and his publisher in New York City" (4 N. Y. 2d, at p. 318).

(2)

The question remains whether the fact that the film prints in the present case were exported makes the tax on appellant's receipts a tax on exports such as is barred by the Import-Export Clause. As we have shown, both under the contract and in practice, appellant made the delivery of the prints to the distributor before they became exports and before the process of exportation had begun. Under these circumstances the Import-Export Clause does not bar the tax on appellant's receipts.

This Court has now firmly established the rule that goods produced in this country and thereafter exported are not immune from state taxes by virtue of the Import-Export Clause of the Constitution (Art. 1, Sec. 10, Cl. 2), or from federal taxes by virtue of its companion clause exempting exports from federal tax (Art. 1, Sec. 9, Cl. 5), until they actually become exports.

Even though goods are intended to be exported, and are in fact exported, the immunity from tax does not attach until the export begins.

It has also established the point at which export begins as the time the goods are delivered to a carrier or start moving to foreign shores. We have found no case holding goods to be exports, immune from local taxation, at a point prior to such delivery or movement.

In *Turpin* v. *Burgess*, 117 U. S. 504 (1886), a federal stamp tax of 25 cents per pound on tobacco manufactured for export was sustained on the ground that Article 1, Section 9, Clause 5, of the Constitution does not bar a tax on goods not in the course of exportation, the Court holding that a tax is not invalidated merely because the owner intends to export the goods. The Court deemed decisive its earlier decision in *Coe* v. *Errol*, 116 U. S. 517 (1886), where a state personal property tax had been held valid under the Commerce Clause as applied to logs awaiting

shipment to another state and where the Court had held that such property was subject to tax in the state of origin until actually started in course of transportation to the state of destination or delivered to a common carrier for that purpose (117 U. S. at pp. 506-507).

In *Cornell* v. *Coyne,* 192 U. S. 418 (1904), a federal stamp tax of 1¢ per pound on filled cheese was held valid although the cheese had been manufactured under contracts to export it and was in fact exported, the Court holding that the exemption under Article 1, Section 9, Clause 5 of the Constitution "attaches to the export and not to the article before its exportation" (*id.* at p. 427).

In *Spalding & Bros.* v. *Edwards,* 262 U. S. 66 (1923), a federal tax on the sale of baseball equipment was held invalid under Article 1, Section 9, Clause 5 of the Constitution as applied to a sale of bats and balls by Spalding to a purchaser in Venezuela. The purchase was arranged by the foreign purchaser through a commission merchant in New York City, which gave the order to Spalding with directions to pack the goods for export and deliver them to the export carrier.

The Court stated that while the goods were in process of manufacture they were subject to tax even "if they were intended for export and made with specific reference to foreign wants" (*id.,* at p. 69). On the other hand, it said they would clearly be exempt "after they had been loaded upon the vessel for Venezuela and the bill of lading issued" (*id.*). It then concluded that the export in that case had begun at the time of the sale and delivery of the goods by Spalding, on the ground that the "very act that passed the title and that would have incurred the tax committed the goods to the carrier that was to take them across the sea" (*id.*).

It said that "The overt act of delivering the goods to the carrier marks the point of distinction between this case and *Cornell* v. *Coyne,* 192 U. S. 418" (*id.,* at p. 70).

In *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69 (1946), the California sales tax was held invalid, under the Import-Export Clause, as applied to sales of oil by Richfield to the New Zealand government, where delivery was made to a vessel owned by New Zealand "to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer" at Los Angeles; the bill of lading showed Richfield as the shipper and the consignee as a designated naval officer in New Zealand; and Richfield filed the shipper's export declaration with the Collector of Customs.

The Court stated that the certainty that the goods are headed to sea and that the process of exportation has started is normally best evidenced "by the fact that they have been delivered to a common carrier for that purpose." Under the circumstances of the case, however, it stated that the delivery of the oil into the purchaser's vessel was the equivalent of delivery to a common carrier, since there was as little probability "that the oil would be diverted to domestic use" as if a common carrier had been used (*id.*, at pp. 82-83).

It concluded that since the delivery of the oil into the vessel "marked the commencement of the movement of the oil abroad," and was the taxable incident under the sales tax law in question, the tax was void as a tax on "a step in the export process" (*id.*, pp. 83, 84).

In *Empresa Siderurgica* v. *Merced County*, 337 U. S. 154 (1949), the Court explained further what it considered the start of the process of exportation. That was a case involving the imposition of a California property tax on a cement plant in that state that had been sold to a foreign purchaser and was in the process of being dismantled and exported on the tax date.

It was held that the Import-Export Clause did not bar the tax as to any of the plant that had not yet been shipped, even though some of it had been dismantled and crated for shipment.

The Court stated that the test as to when goods enter interstate commerce, as established in *Coe* v. *Errol,* 116 U. S. 517 (1886), should be used to determine when exportation commences under the Import-Export Clause; *i.e.,* that goods are subject to state taxation " 'until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey' " (337 U. S., at p. 156).

Under that test, it said, "it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it" (*id.*). Delivery of packages to the carrier, as in *Spalding,* or of oil to a ship furnished by the purchaser, as in *Richfield,* it said, are sufficient to give tax immunity (*id.,* at pp. 156-157). It then concluded (p. 157):

> "It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice."

It held that the part of the plant that had been dismantled for shipment was taxable because "it had not been delivered to any carrier for export or otherwise started on its journey on the tax date;" and the fact that a diversion would entail a breach of contract, that a letter of credit had been deposited and that an export license had been obtained, did not start the process of exportation because "the movement to foreign shores had neither started nor been committed."

Finally, in *Joy Oil Co.* v. *State Tax Commission,* 337 U. S. 286 (1949), it was held that a Michigan personal property tax was valid as imposed on gasoline purchased by a Canadian corporation for export to Canada, but stored

by it in Michigan for a period of 15 months under railroad bills of lading marked "For Export to Canada."

The Court said that the petitioner's intent to export the gasoline, and the fact that it was eventually exported, were not enough to confer immunity from local taxation. It stated that while the gasoline was in storage it might have been diverted to domestic markets "without even breach of any contractual commitment to a foreign purchaser", and concluded that the Import-Export Clause was meant to exempt from local taxation "property being exported" not property "eventually to be exported" (*id.*, at p. 288).

(3)

Before considering whether the appellant may be taxed on the basis of receipts from film prints which were not placed in storage, we shall discuss the question of whether the Import-Export Clause bars the tax insofar as it is based on the stored prints.

It is our view that the constitutional provision clearly does not bar the tax with respect to such film prints. Appellant, when it delivered prints to the distributor, which were then sent to the distributor's warehouse, did not start the articles in the stream of export. It merely made a local delivery to a local customer. The fact that the customer intended ultimately to export the prints and that, under its contract with the appellant, could only exhibit the film in foreign countries, does not, under the decided cases, bar a tax on the appellant. The *Empresa Siderurgica* case (337 U. S. 154), and other cases which we have discussed, establish that "an intent to export" is not enough to bar the tax.

The evidence indicates that the number of film prints placed in storage was substantial. When counsel for the respondent visited the premises of the appellant, an employee of the distributors, Mr. Klor, showed him an

inventory book with about 300 pages in it (fols. 650-652). This related only to films then in storage since inventory sheets were destroyed as soon as all prints of a film were removed from storage (fols. 653-654).

It was testified that from 50 to 70 prints of a film were made for foreign use (fol. 563). Not all of them were placed in storage, but reserve or extra prints, those which were to be superimposed with Spanish and Brazilian titles and those which could not be shipped immediately for one reason or another, were placed in storage (fols. 563-564).

The reasons for delaying immediate shipment, applicable to both technicolor and to black and white prints, were varied. Film prints were stored when the consignee did not have sufficient dollars to pay for the shipment (fols. 468, 639-640) and where the expiration of an import license made it necessary to await the periodic issuance of a new one (fols. 461-463, 640-641). In addition, prints were stored because they were returned from abroad so that they could later be sent to another country, or because a foreign censor had refused to approve them (fols. 466-467, 642-643, 677-678). The distributor would hold such a print in storage while it "tried to find another country willing to take this particular picture" (fols. 642-643).

Some indication of the extent to which prints of a technicolor film were placed in storage can be obtained from the exhibits relating to "Bloodhounds of Broadway" (City's Exhs. J, K, M, pp. 475, 476, 478). Exhibit K lists 38 prints which were placed in the warehouse and Exhibit J lists 4 additional prints which were similarly stored. Exhibit M is a list of prints which, after Spanish titles were superimposed, were sent to the De Luxe Laboratory (fols. 522-523). On this list 2 prints for Chile and 8 prints for Brazil were marked "Hold." This notation means that they were to be sent back to the warehouse

(fols. 525-526). We shall assume that these ten prints had originally been in the warehouse and were returned to it after removal for the superimposition of Spanish titles. Even on this assumption we find that at least 42 prints out of the 50 to 70 made for foreign use were placed in the warehouse and that ten of these were removed from and then returned to the warehouse.

An inventory sheet dealing with another picture shows that 41 of the prints were stored in the warehouse (City's Exh. I, p. 474). Thus, it would appear that far more than a majority of the technicolor prints made for the distributor for exhibition in foreign countries were placed in a warehouse after delivery to the distributor and before shipment abroad. It should be made clear at this point that the distributor, not the appellant, determined whether prints should be stored in the warehouse and that the distributor paid the warehouse charges directly to the warehouse company (fols. 525, 672, 775-776).

This, in and of itself, should be determinative of the tax issue in the present case. While not all of the film prints were placed in storage, the record indicates that far more than half of the technicolor prints were stored and that black and white prints were also placed in the warehouse. The appellant has failed to show to what extent prints were not stored after delivery to its distributor customers and, since the burden of showing that its receipts were not subject to the tax is on the taxpayer, this failure makes it impossible to determine how much of the assessment would be improper even if the tax were barred with respect to unstored prints. *Norton Co.* v. *Dept. of Revenue,* 340 U. S. 534, 537-538 (1951); *Chicago* v. *Willett Co.,* 344 U. S. 574, 578 (1953); *Railway Express Agency* v. *Virginia,* 358 U. S. 434, 436 (1959); *Commissioner* v. *Hansen,* 360 U. S. 446, 468-469 (1959); *Peo. ex rel. Kohlman* v. *Law,* 239 N. Y. 346, 350-352, 146 N. E. 622, 624 (1925); *Matter of Ajax Trucking Company, Inc.* v. *Browne,*

272 App. Div. 1087, 1088, 74 S. 2d 737, 738 (3d Dept., 1947), affd. 298 N. Y. 736, 83 N. E. 2d 144 (1948), app. dism. 337 U. S. 951 (1949).

(4)

Moreover, it is our contention that even the unstored film prints were not placed in the export stream by the appellant.

We shall assume that appellant did not make delivery and did not comply with its obligations under the contracts until prints of a film were delivered to the distributor. In this connection we shall assume that De Luxe Laboratories acted as an agent for the appellant in making the prints.

The record, however, appears to establish that De Luxe was acting for the distributor, not for the appellant, when it delivered the prints to the carriers for shipment abroad. The contracts provide for delivery by appellant to the distributor "f.o.b. New York" (fols. 877, 958). They provide that the cost of making prints, etc. shall be paid by the distributor to appellant "as additional rental for the rights herein sold," but they provide immediately thereafter that the distributor shall pay all "forwarding and shipping charges", and make no provision that these latter payments are to go to the appellant (fols. 872-873, 953-954).

In actual practice the shipping department of De Luxe turned over to the carriers the prints that were going abroad without prior storage. But the record shows that, in doing this, it acted on behalf of the distributor, not on behalf of appellant. Although De Luxe was a subsidiary of the appellant, it did work for firms other than appellant and its affiliates (fols. 201-202). The president of De Luxe stated that it never made physical delivery to the premises or an employee of the distributor (fol. 219), but he went on to say that De Luxe acted "merely as

a shipping depot for the International department" (fol. 222). That the term "International department" is a term used by the witnesses to describe the distributors (Twentieth Century-Fox International Corporation and Twentieth Century-Fox Inter-America, Inc.) is clear from other testimony (fols. 347-348, 361-362).

Evidence that the transfer of the completed prints to the De Luxe shipping department constituted delivery to the distributor is found in the procedure followed in connection with such a transfer. De Luxe at that point (when the prints were completed) gave notice to the distributor (not to appellant) that the prints were ready, by furnishing the distributor with copies of the delivery slip (fols. 415-416, 541-543). Only after receiving this information did the distributor issue shipping instructions to De Luxe (fols. 543-544). Thereupon De Luxe packed the shipment and submitted a packing list to the distributor (fols. 544-545). The distributor then prepared invoices covering the prints directed to the foreign customer, which showed the distributor (not appellant) as the seller (fols. 549-551).

Next, the distributor sent a copy of the packing list to a shipping broker, who then booked the shipment on a carrier, and advised De Luxe to deliver the prints to the carrier (fols. 545-548).

It seems clear from this procedure that De Luxe, once the prints were sent to its shipping department, acted on behalf of the distributor, not appellant. Its activities at this point were well described by its president as those of "a shipping depot" for the distributor (fol. 222).

(5)

Appellant relies principally upon *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U. S. 69 (1946), where the California sales tax was held invalid under the Im-

port-Export Clause as applied to a sale of oil. In that case the taxpayer sold the oil to the New Zealand Government, consigned to the Naval-Officer-in-Charge, Auckland, New Zealand, and delivered the oil "to the order of the Naval Secretary, Navy Office, Wellington, into N.Z. Naval tank steamer R.F.A. Nucula at Los Angeles, California" (*id.*, at p. 71). It was held that the delivery of the oil into the purchaser's ship at Los Angeles "marked the commencement of the movement of the oil abroad" (*id.*, at p. 83).

As we have shown, the appellant in the present case made no comparable delivery. It delivered the prints to the distributor in New York City prior to their movement abroad, and it was the distributor that subsequently had them delivered to the carrier for shipment. The distributor, rather than the appellant, started the prints on their foreign journey.

The present case is controlled by *Empresa Siderurgica* v. *Merced County*, 337 U. S. 154 (1949), since, at the time the tax on appellant accrued (which occurred no later than when it delivered the prints to the distributor), the foreign movement of the prints had not commenced.

POINT II

The Court of Appeals, in examining the referee's reports without disclosing them to appellant, did not deny appellant due process of law.

(1)

The record in this case contains the two determinations of the City Comptroller issued after the hearings held in his office (pp. 520, 666) but does not contain the reports made by the individuals in his office who conducted the hearings. Appellee has taken the position that such reports are not evidence and are not properly part of the record, since, under the terms of the state enabling act

and the local tax law, it is only the appellee's determination which is the subject of review in this proceeding.

The state courts sustained appellee's position with respect to these reports and excluded them from the record (Juris. Statement, p. 30).

Appellant asserts that the Court of Appeals denied it due process of law in that, on the argument of the appeal, the Court received the reports from counsel for the appellee and examined them without disclosing the reports to appellant. Since the hearing referee's reports were merely intradepartmental memoranda, not binding on either the appellant or appellee, the state court properly examined them and excluded them as irrelevant.

(2)

Under the decisions of this Court the procedure followed by the Court of Appeals with respect to the reports was valid. The practice whereby a court inspects documents presented by one side for the purpose of considering their admissibility, without submitting them to the opponent, is well established. As this Court said in sustaining the "Jencks Act," designed to limit defense access to government papers, it would "defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." *Palermo* v. *United States,* 360 U. S. 343, 354 (1959). See also *Jencks* v. *United States,* 353 U. S. 657, 676 (1957); *Rosenberg* v. *United States,* 360 U. S. 367, 370 (1959); *Gonzales* v. *United States,* 364 U. S. 59, 63-64 (1960).

(3)

Appellant relies on three cases; namely, *Universal Oil Products Co.* v. *Root Refining Co.,* 328 U. S. 575 (1946); *Mazza* v. *Cavicchia,* 15 N. J. 498, 105 A. 2d 545 (1954), and *Application of O'Meally* v. *Rohan,* 286 App. Div. 872, 142 S. 2d 239 (2nd Dept., 1955). Juris. Statement, pages 24-26.

The *Universal Oil Products* case is not at all in point. It simply held that, if rights of parties are to be adjudicated in the course of an investigation directed by the courts, "the usual safeguards of adversary proceedings must be observed" (328 U. S., at p. 580).

In the *Mazza* case the New Jersey Court held that, in an administrative proceeding, due process requires that the report of the person hearing the testimony must be shown to the parties prior to the submission of the report to the deciding officer so that the individual concerned may "supplement, explain, and give different perspective to the hearer's view of the case", and "correct any mistakes that may appear in the report", thus protecting the individual against the possibility "of a miscarriage of justice or the suspicion thereof" (105 A. 2d, at pp. 555, 559).

In the *O'Meally* case, the (New York) Appellate Division, Second Department, citing the *Mazza* decision, held that the administrative agency was required to furnish the hearing officer's report to the individual concerned prior to action by the agency so that the party would have an opportunity to contravert the hearing officer's findings before the agency made its decision.

In the case at bar the appellant has not raised the question involved in the *Mazza* or *O'Meally* case. It is not appealing, as in those cases, from the refusal to give it a copy of the report prior to the administrative determination. It is appealing to this Court solely (in connection with the reports) from a claimed violation of due process resulting from the examination of the reports by the Court of Appeals without disclosing their contents to the appellant or its counsel or requiring that they be inserted in the record.

In fact, the appellant never sought to obtain the first report until after the first administrative determination; nor did it seek to obtain the second report until after the second determination.

Even if it had sought the reports before the administrative determination and its present appeal sought a review of a refusal to furnish it with the reports, the *Mazza* and *O'Meally* cases would, nevertheless, be distinguishable. The appellant does not, as in those cases, seek the reports to contravert or correct them. It seeks the reports to use them to impeach the determination of the administrative officer who under the law is required to make the determination.

The sole reason appellant seeks to obtain the referee's reports is because its counsel believes that they contain recommendations that simple interest should be imposed in this matter rather than statutory penalties and interest (5% penalty for the first month of delay and 1% a month interest thereafter), as assessed by appellee in his determination (fols. 1627-1628, 1681-1682, 1690-1692, 1715-1724. Pet's Br. in App. Div. on review of remand hearing, pp. 9-11; Pet's Br. in Court of Appeals, pp. 43, 45).

Thus, appellant's claim is not that the hearing referees may have erred in their analysis of the evidence and thereby led the appellee into error, but that the referees in their reports correctly analyzed the evidence and the appellee erred in not following their recommendations. Since the issue raised by appellant is not whether the referees' reports correctly reflect the evidence but whether appellee's decision does, the reports are irrelevant here. Assuming that the referees did recommend that the penalties should be remitted to simple interest, that fact has no bearing on the question whether the appellee herein was justified in refusing to exercise his discretion to remit the penalties to interest. That decision must stand or fall on whether the *appellees'* findings and conclusions with respect to the penalties question are sound and are supported by the evidence.

It should be noted that the appellant is not seeking in this Court a review of the decision below sustaining the penalties (Juris. Statement, p. 1).

(4)

Furthermore, this Court has held that such reports of hearing officers need not be disclosed, since they are simply part of the process within the administrative agency that goes into the making of the final decision. *Gonzales* v. *United States,* 364 U. S. 59, 63 (1960); *United States* v. *Morgan,* 313 U. S. 409, 422 (1941). *Cf., National Labor Relations Board* v. *Mackay Radio & T. Co.,* 304 U. S. 333, 350-351 (1938).

The New York Court of Appeals recently disagreed with the holding in the *Mazza* case and stated that, in situations where the hearing officers "do no more than sift and analyze the record" and report to others, due process does not require disclosure of such reports. *Matter of Sorrentino* v. *State Liquor Authority,* 10 N. Y. 2d 143, 147, —— N. E. 2d —— (1961). See to the same effect, *Peoria Braumeister Co.* v. *Yellowley,* 123 F. 2d 637, 639 (7th Circ., 1941) and *Norris & Hirshberg* v. *Securities and Exchange Commission,* 163 F. 2d 689, 693 (Circ., D. C., 1947), cert. den. 333 U. S. 867 (1948).

CONCLUSION

The appeal to this Court from the orders of the Court of Appeals and of the Supreme Court of the State of New York should be dismissed.

September 25, 1961.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 373

In the Matter of the Application of

TWENTIETH CENTURY-FOX FILM CORPORATION,

Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee,

for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

POINT 1

THOSE FACTS WHICH ARE EITHER CONCEDED OR UNDISPUTED IN THE MOTION TO DISMISS REVEAL THAT A SUBSTANTIAL QUESTION UNDER THE IMPORT-EXPORT CLAUSE EXISTS.

Appellee, in his motion to dismiss the appeal, takes issue with appellant's interpretation of some of the evidence; but there is enough agreement between the parties to reveal that a substantial constitutional question does exist.

The parties are in agreement that appellant rented its motion picture film to International; that the contract between appellant and International did not authorize the use of the film in the United States; that the film was never used in the United States; that the film was shipped abroad from a point within the City of New York; and that the receipts which have been taxed could not have been realized unless and until the film had been exported.

Such being the case, it is immaterial whether, as appellee contends, the film came into the possession of International before it was exported. Appellee urges an interpretation of the import-export clause under which the touchstone is not whether the receipts necessarily arise out of the export of goods but whether someone other than the owner had the goods in his possession at or before the time the export journey commenced. In none of its decisions has this Court, or even the dissenting justices, suggested so narrow and illogical an interpretation of the constitutional provision. In *Richfield* this Court said that the test was whether "the certainty of the foreign destination is plain" (329 U. S. 83). The certainty could scarcely be plainer than in a case where export necessarily precedes the creation of the receipts,—where the proceeds of foreign exploitation are the measure of the receipts.

The same test—the certainty of the foreign destination—was applied in six of the seven cases on which appellee relies (Motion, pp. 12-17); and the seventh, *Steinbeck*, did not involve either the import-export clause or tangible property. *Turpin* v. *Burgess*, 117 U. S. 504 (1886) and *Cornell* v. *Coyne*, 192 U. S. 418 (1904), involved clause 5 of section 9 of Article I of the Federal Constitution, which prohibits the federal government from levying a tax on exports. As this Court explained in *Richfield* (329 U. S. 79), the Court in those cases upheld federal excise taxes on manu-

factured tobacco and filled cheese because, *at the time the tax attached,* there was no certainty the goods would be exported. In *Spalding & Bros.* v. *Edwards,* 262 U. S. 66 (1923), on the other hand, a federal excise tax was struck down because, as the Court also explains in *Richfield* (329 U. S. 80-81), the tax attached at a time when the goods had commenced their export journey.

Empresa Siderurgica v. *Merced County,* 337 U. S. 154 (1949) and *Joy Oil Co.* v. *State Tax Commission,* 337 U. S. 286 (1949), both decided after *Richfield,* involved the constitutionality, under the import-export clause, of a local property tax on goods destined for export. The test was again whether the goods had started their export journey when the tax attached; and the Court held that they had not. In *Empresa* this Court said (p. 157):

> ". . . it is not enough that *on the tax date* there was a purpose and plan to export this property. . . . It might still have been diverted into the domestic market." (italics supplied).

In *Joy* the Court said (p. 288):

> "The circumstances which tended, *at the time when the tax was assessed,* to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation." (italics supplied).

Appellee, at pages 13 and 16 of his motion, seems to agree that such is the test; but he then disregards the test by urging that he may lawfully collect a tax which could not possibly have attached before export.

Coe v. *Errol,* 116 U. S. 517 (1886), the last of the six cases, involved the commerce clause, not the import-export

clause. Even so, the question was whether timber which the owner had cut in New Hampshire with the intention of shipping into Maine could be subjected to a New Hampshire property tax before shipment. The Court held that it could, because it had not commenced the interstate journey at the time the tax attached. The Court explained that decision too in its *Richfield* opinion (329 U. S. 79).

The instant case does not involve a tax which attached or which could have attached before export. The question is not whether the City of New York could have laid a property tax on the black and white films while they were still at the De Luxe laboratory in the City of New York or whether the Borough of Fort Lee, New Jersey, could have laid a property tax on the color films while they were being superimposed at the Titra laboratory or stored in the warehouse of Bonded Film Storage. Neither is the question whether the City of New York may tax gross receipts which are realized before goods have commenced their export journey. The question here is whether the city may collect a tax measured only by what the goods earned abroad because they were exported. Appellant suspects that the referee in the Bureau of Excise Taxes recognized the distinction and that that is one of the reasons why appellee is concealing the referee's report.

Matter of Steinbeck v. *Gerosa*, 4 NY 2d 302, 151 N. E. 2d 170 (1958), app. dism. 358 U. S. 39 (1958), is the only other authority which appellee cites (Motion, p. 12) in support of his motion to dismiss the appeal in so far as the tax itself is concerned. That case did not involve the export of property. In fact it did not involve the import-export clause at all. The question was whether the City of New York could levy a gross receipts tax on royalties received by a resident author from a publishing house measured in part by the number of books the publishing house sold,—

books which the author had never owned or possessed, in which he never had any interest and which, for the most part, had never been in the City of New York.

The record in *Steinbeck* discloses that such of the books as were sold outside the United States were printed outside the United States and had never been exported. The attorney for the taxpayer conceded as much in his opening statement (see page 32 of the record in *Steinbeck*); and he never suggested in any of his briefs below, in his jurisdictional statement here or in his answer here to the petition to dismiss that the case involved a tax on tangible property or on the receipts therefrom. His principal argument was under the first and fourteenth amendments. He made a subsidiary point in his jurisdictional statement about the commerce clause, not the import-export clause. His argument was that the licenses Steinbeck gave under his copyright must have contemplated that the licensees would ship their books in interstate commerce (see pp. 4-5, 16-17 of the jurisdictional statement in *Steinbeck*) and that therefore the license transaction itself was one in interstate commerce. In his answer to the motion to dismiss, he did not press the contention. He talked about the first and fourteenth amendments only.

The appellee there, who is also the appellee here, stressed at pages 4 and 13 of his motion to dismiss that Steinbeck never had any interest in the books that the publishers printed under his license. Therefore, appellee must be speaking in the vernacular rather than with legal precision when he tells the Court at page 12 of his motion to dismiss this appeal that:

> ". . . the same tax was sustained on Mr. Steinbeck's royalties from the sale of his (sic) books abroad, * * *"

The New York Court of Appeals, in upholding the tax in *Steinbeck*, had already said, quoting from an earlier decision (4 NY 2d 319, 151 N. E. 2d 180):

> "This tax is not on the goods, or on the proceeds of the goods. . . ."

The tax in the instant case *is* on the proceeds of the goods. It is on the rentals which appellant received for the use of its films abroad,—rentals which could not be realized until and unless the films were exported. *Steinbeck* is no more than a reaffirmation of the principle that a resident of the City of New York may be required to pay gross receipts tax on his receipts from business intangibles—in that case royalties from literary compositions written while Steinbeck resided in New York.

Since the parties are not in disagreement on those facts which are basic to the constitutional issue, appellant will not belabor the question whether International, the bailee, got possession of the films before the export journey commenced. That was technically so with respect to those color films which were stored in New Jersey, inasmuch as International paid the warehouseman. It was never so as to black and white. By examining appellee's references to the record, the Court will find that the testimony to which appellee refers either pertained only to color films or pertained to black and white films in 1951 and 1952, several years after the realization of the receipts which have been taxed in this proceeding. Appellant suspects that the referee, who is the only administrative or judicial officer who saw the witnesses and heard them testify, said so in his report.

POINT 2

THE DUE PROCESS QUESTION IS ONE OF FIRST IMPRESSION AND WORTHY OF SERIOUS CONSIDERATION.

It is important to bear in mind that appellant has never asked this or any court below to hold that appellant was deprived of due process of law though the failure of ap-

pellee to give it copies of the referees' reports and an opportunity to rebut them before appellee made his administrative determination. Neither is appellant urging that the failure of the lower courts to require the insertion of the reports in the record was, standing alone, a denial of due process. The due process contention is that the Court of Appeals, and the Appellate Division before it, had no right, over the objection of appellant, to receive those reports and read them in secret before deciding the case. The facts are undisputed:

Appellant protested to the Court of Appeals that the appellate division had received and read the referees' reports before rendering its final decision and without revealing their contents to appellant or its counsel (R. 693-701). Appellant asserted that this was a denial of due process of law (R. 700-701) and it asked the Court of Appeals either to send the case to another appellate division for a determination *de novo* or itself to make a determination *de novo* (R. 701). Appellant made no claim that the reports were evidence (R. 699). Appellant's counsel expressly disavowed in his brief in the Court of Appeals any contention that the referees' reports contained evidence. He said:

> "The lower court has said (f. 2044):
>
> 'The reports sought to be made part of the record by petitioner contained no evidentiary matter and merely represent opinions of subordinates which the Comptroller was not bound to follow.'
>
> "The language seems to imply that petitioner contended below that the reports were evidence. If so, the implication is misleading. Petitioner said in its briefs below that respondent was not bound to follow the recommendations of his referees. It urged, however, that the reports should have been included in the returns to the article 78 orders be-

cause (a) they were part of the record of the administrative proceeding under review and (b) there is no other statement in the record as to why a tax is or is not due. It is the usual thing for a court, when reviewing a decision of a lower court or of an administrative officer or body, to have the benefit of the views of those who were designated to conduct the proceedings below. In the instant case, such reports should be helpful to this Court in evaluating the evidence in the record, for they are the views of the only persons who have seen the witnesses and heard them testify. The *Scalice* report was approved by Referee Scalice's immediate superior without change (ff. 1909-1913); yet petitioner and the Court are not permitted to see the report and there is no contrary opinion in the record, either by the undisclosed functionary who chose to ignore the reports or by the appellate division.

"The opinions of lower courts are not evidence; but they are always included in records on appeal. Certainly the report of someone designated by respondent to conduct the proceedings and make a report, and the unqualified approval thereof by his immediate superior, would be at least as helpful to the appellate tribunal. The more so in the instant case where those who presumably have views contrary to those expressed in the reports have not seen fit to present their views in writing so that their logic may be examined critically."

To forestall a repetition of what had occurred in the Appellate Division, appellant's counsel again disavowed, on oral argument before the Court of Appeals, any contention that the referees' reports were evidence or contained evidence. That is why appellant says that the Court of Appeals' belated statement that the reports were examined to see whether they contained evidentiary matter (R. 685, 703) is a subterfuge.

During the argument by appellee's counsel, the Chief Judge, clearly apprehending some constitutional danger from reading the documents without revealing their contents, asked appellant's counsel to consent to that procedure (R. 708). After consent was refused, the court did it anyhow (R. 708-709).

Appellant does not yet know what is in the reports. But it is sure that they are relevant to the controversy, for they are concededly the reports of the only persons who saw the witnesses and heard them testify. And it naturally arouses suspicion when a court, after unsuccessfully seeking permission to read and conceal a relevant document, does it anyhow. If the referees' reports were not properly part of the record, as appellee urges (Motion, p. 26) and the Court of Appeals seems to think (R. 685-686, 703), the court ought not to have looked at them.

The authorities which appellee cites (Motion, pp. 23, 26) do not touch upon the question which has been raised here; and appellant has found no case where the report of a *referee* (R. 203, 233, 264, 552, 553, 554, 562, 580) has been withheld from an interested party. *Jencks* v. *United States*, 353 U. S. 657 (1957), *Palermo* v. *United States*, 360 U. S. 343 (1959) and *Rosenberg* v. *United States*, 360 U. S. 367 (1959), outlined the extent to which, and the process under which, defense counsel in a criminal case is entitled to see government reports containing possible inconsistent statements of government witnesses. Appellant seeks no statements of witnesses. All it wants are admittedly relevant documents which the lower courts sought and read before rendering their final decisions.

In *United States* v. *Morgan*, 313 U. S. 409 (1941), the court held that, in a proceeding to set maximum rates to be charged by market agencies for their services at the Kansas City stock yards, the Secretary of Agriculture could prop-

erly disregard a memorandum of a subordinate urging certain considerations favorable to the market agencies,—a subordinate who had taken no part in the hearings. No such question is presented here.

In *N. L. R. B.* v. *Mackay Radio etc. Co.,* 304 U. S. 333 (1938), the court held that the full National Labor Relations Board at Washington could hear the case on the record below without requiring the trial examiner to render a report. That was a case where the trial examiner made no report.

In *Peoria Braumeister Co.* v. *Yellowley,* 123 F. 2d 637 (7th Cir. 1941), the court said it was desirable, but not essential, that the licensee, in a proceeding to revoke his liquor license, be served with a copy of the hearing examiner's report before the case was decided by the administrative officer. That was not a case where the court read the report and concealed it. In fact it appears that, by the time of the judicial proceeding, everyone had seen the report.

In *Norris & Hirshberg, Inc.* v. *S. E. C.,* 163 F. 2d 689 (D. C. Cir. 1947), the court said that the commission could utilize the services of subordinates to analyze the evidence received by a trial examiner in a proceeding to revoke defendant's registration as a dealer in securities without revealing to defendant the memoranda which those subordinates prepared. The report of the trial examiner himself was not involved; and the court never saw the memoranda.

Gonzales v. *United States,* 364 U. S. 59 (1960), did not involve the reading by the court and the concealing of a relevant report. Gonzales claimed a military service classification as a minister of religion. When his board eventually classified him 1A, he was given a hearing before an officer in the Department of Justice who made a favorable report; but the Attorney General recommended approval of the 1A classification. The matter then went to an appeal board which furnished Gonzales with a copy of the Attor-

ney General's recommendation but not of the hearing officer's report inasmuch as that report had not been revealed even to the appeal board. On affirmance of the classification by the appeal board and failure to report for induction, Gonzales was convicted for violating the Military Training and Service Act. In this Court, Gonzales claimed unsuccessfully that he should have been given a copy of the hearing officer's report. The Court said (p. 63) the report was not essentially different from a memorandum of an attorney in the Department of Justice and that anyhow the report had never been seen by the appeal board, the body which reviewed the determination of the local board.

Here, unlike *Gonzales,* the report *was* submitted to the body which reviewed the administrative officer's determination—i.e. the court—and was still concealed from the interested party.

In none of the foregoing cases was the report of a referee involved,—only the report of a person whose title signified lesser authority. *Matter of Sorrentino* v. *State Liquor Authority,* 10 NY 2d 143, 176 N. E. 2d 563, the only other authority cited by appellee (Motion, p. 26), was decided by the Court of Appeals in July and not published in the advance sheets until two days after the jurisdictional statement here was served and mailed to Washington. Even *Sorrentino* is substantially different in that there (a) the hearing officer was not a referee, (b) the hearing officer's report was given to the interested party before the court proceeding commenced, (c) the hearing officer's report was inserted in the record and (d), *a fortiori,* the court did not participate in any concealment. The Court of Appeals expressly avoided deciding the due process question (10 NY 2d 147, 176 N. E. 2d 564); but it upheld the ruling of a different Appellate Division that the interested party should have been given a copy of the report before administrative determination by the authority itself.

The court did say (*idem*) that it was difficult to perceive why due process required a report to be made available to the litigant if the hearing officer merely sifted and analyzed the record; but it emphasized that it was not deciding that question. The same court has avoided by silence the more serious constitutional question which appellant has raised,—namely, the validity of the determination below when the Appellate Division read *referees'* reports before final decision and concealed their contents from appellant.

At any rate, *Sorrentino* seems to have destroyed the excuse which the Appellate Division gave for not requiring the referees' reports to be inserted in the record in the instant case (R. 682). The fact that the hearing officer's report contained no evidentiary matter and that the State Liquor Authority was not bound to follow his recommendations did not prevent the Court of Appeals from holding that the report should have been made available to the adverse party before the administrative determination.

As noted in the jurisdictional statement (pp. 8, 24), what the special master did in *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575, 578-579 (1946), most nearly approximates what the lower courts have done in the instant case; and this Court seems to have disapproved of those actions of the special master.

There remains to be cleared up one misconception which has probably arisen because the attorney who handled this case on behalf of appellee in the Appellate Division is dead and those who prepared the motion to dismiss are unfamiliar with what transpired in that court. At page 25 of the motion appellee says that appellant wants the referees' reports because appellant's counsel believes that they would support its claim that simple interest instead of penalties should be assessed on the alleged tax deficiencies.

That is not correct. The first referee, Scalice, held a hearing (six sessions) on both the taxes and the penalties.

He wrote a report. As there is no published manual of procedure in the Bureau of Excise Taxes, appellant learned for the first time that Mr. Scalice had rendered a report when appellee referred to it in his answer in court (R. 21). At the earliest opportunity—page 13 of its brief which was served and filed before the first oral argument in the Appellate Division—appellant called the court's attention to the omission of the report from the record. The propriety of the omission was strenuously argued orally by both sides on the first appearance before the Appellate Division; but the court ignored the point (R. 675-676). Thereafter no opportunity to seek to insert the report in the record was overlooked (R. 542-543, 545, 560-561, 564, 572-576, 682, 693-701). The impropriety of the omission of the report was a separate point in the briefs filed with the Appellate Division after remand and redetermination of penalties, which was before that court made its final order, and it was also a separate point in all briefs in the Court of Appeals.

Appellant never sought the reports for the "sole reason" (Motion, p. 25) that they had to do with the question of interest or penalties. It wanted the Scalice report because it assumed that that report related to both issues in the proceeding. The Saltzman report (R. 554) presumably pertains only to interest or penalties. If the tax falls, the penalties fall too. The only significance of the Saltzman report in so far as this appeal is concerned is that the Court of Appeals deprived appellant of due process of law by reading that report too before rendering its decision.

CONCLUSION

On those facts which are undisputed, a substantial question under the import-export clause exists.

The resort by the Court of Appeals to undisclosed but relevant documents before rendering its decision was a denial of due process of law which requires reversal of the orders appealed from and reargument and redetermination in the court below after insertion of the referees' reports in the record.

October 10, 1961.

Respectfully submitted,

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